APPENDIX A

Excerpt From April 18, 1994 Brief Of Defendant, The United States, To The U.S. Court Of International Trade In *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement*, Court No. 93-05-00273

IV. ARGUMENT

A. THE COURT SHOULD REMAND THIS CASE SO THAT COMMERCE MAY APPLY ITS NEW METHODOLOGY FOR MAKING THE VAT ADJUSTMENT.

Subsequent to Commerce's issuance of the final results, this Court in *Federal-Mogul Corp. v. United States,* 834 F. Supp. 1391 (CIT 1993), rejected the way in which Commerce had been interpreting *Zenith* when making the VAT adjustment. Commerce has since adopted the *Federal-Mogul* Court's interpretation of *Zenith* as its practice. *See, e.g., Final Determination of Sales at Less than Fair Value; Certain Stainless Steel Wire Rod from France,* 58 Fed. Reg. 68865, 68866 (Dec. 29, 1993). Accordingly, the Court should remand this case so that Commerce may make the VAT adjustment consistent with its new practice.

APPENDIX B

Excerpt From April 18, 1994 Brief Of Defendant-Intervenor, CEMEX, S.A., To The U.S. Court Of International Trade In *Ad Hoc Committee Of AX-NM-TX-FL Producers Of Gray Portland Cement*, Court No. 93-05-00273

III. THE COURT SHOULD REMAND THIS DETERMINATION TO THE DOC WITH INSTRUCTIONS TO MAKE ADJUSTMENTS FOR THE VALUE ADDED TAX IN ACCORDANCE WITH RECENT JUDICIAL DECISIONS

In the final determination at issue in this litigation, the DOC stated that

> [W]e have changed our practice and will no longer calculate a hypothetical tax on the U.S. product, but will, for the time being, add to the U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation. By adding the amount of home market tax to U.S. price, absolute dumping margins are not inflated or deflated by differences between taxes included in FMV and those added to U.S. price.

58 Fed. Reg. at 25,809. Ad Hoc Committee disputes this approach.

Since this statement was published, this Court has issued a number of opinions clearly invalidating the DOC's approach. In *Federal-Mogul Corp. v. United States,* 17 CIT —. Slip Op. 93-221 (November 30, 1993), this Court specifically held that the DOC is required to determine where in the stream of commerce the foreign country applies its value-added tax in the home market, apply the same rate *to the U.S. price* calculated at the same point in the chain of commerce, and add this amount to U.S. price. The methodology employed by the DOC in this case clearly runs counter to that mandated by *Federal-Mogul.* Moreover, the *Federal*

Mogul court also explicitly rejected the DOC's contention that its own approach was supported by language in *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993).

Given that this Court has very clearly rejected the methodology for adjusting U.S. price for forgiven taxes in the home market applied by the DOC in the proceeding at issue here, the determination should be remanded to the agency to recalculate U.S. price in accordance with the dictates of *Federal-Mogul* and *Zenith*.

APPENDIX C

Excerpt From October 19, 1994 Submission By CEMEX, S.A. To The U.S. Commerce Department

III. Upon Remand, The DOC Should Apply Its New Methodology To Adjust U.S. Price and FMV To Take Into Account Indirect Taxes Not Collected Due To Exportation Of The Subject Merchandise

In the final results, the DOC did not calculate a hypothetical tax on U.S. sales but added to U.S. price the absolute amount of tax on the comparison merchandise sold in the home market. 58 Fed. Reg. at 25,809 (1993). The methodology the DOC applied in the final results was subsequently overturned in *Federal-Mogul Corp. v. United States,* 17 CIT —, 834 F.Supp. 1391, 1396 (1994). The Court therefore instructed the DOC to "apply its new VAT methodology as approved in *Torrington Co. v. United States,* 18 CIT —, 853 F. Supp. 446, 448-49 (1994)." The DOC should therefore apply its new methodology in accordance with the Court's instructions.

APPENDIX D

Excerpt from October 23, 1995 Brief Of Appellant, CEMEX, S.A., To The Court Of Appeals For The Federal Circuit In *Ad Hoc Committee Of AZ-NM-TX-FL Producers Of Gray Portland Cement*, Appeal No. 95-1485

C. The VAT Methodology Applied By The DOC In The Remand Results and Affirmed By The CIT Was Contrary To Law And Should Be Reversed

. . .

Although *Federal Mogul II* implies that alternative VAT methodologies may also be found lawful, in this case where the Federal Mogul VAT methodology was applied in the contested final results, the DOC may not at this time request that the alternative VAT methodology used in the invalid remand replace the VAT methodology specifically approved by this Court.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

19 U.S.C. § 1677a (1988)

§ 1677a. United States price

(a) United States price

For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase price

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's sales price

For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

(d) Adjustments to purchase price and exporter's sales price

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all

other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States;

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

(e) Additional adjustments to exporter's sales price

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677b (1988)

§ 1677b. Foreign market value

(a) Determination; fictitious market; sales agencies

For purposes of this subtitle—

(1) In general

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—

(a) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quanti-

ties and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) Use of constructed value

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(3) Indirect sales and offers for sale

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales

agency or other organization related to the seller in any of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) Other adjustments

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(5) Fictitious markets

The occurrence of different movements in the prices at which different forms of any merchandise subject to an antidumping duty order issued under this subtitle are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from which the merchandise is exported may be considered by the administering authority as evidence of the establishment of a fictitious market for the merchandise if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise.

(b) Sales at less than cost of production

Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—

(1) have been made over an extended period of time and in substantial quantities, and

(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a

basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

(c) Nonmarket economy countries

(1) In general

If—

(A) the merchandise under investigation is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a) of this section.

the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e) of this section. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

(2) Exception

If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise under paragraph (1), the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—

(A) comparable to the merchandise under investigation, and

(B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,

is sold in other countries, including the United States.

(3) Factors of production

For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to—

(A) hours of labor required,

(B) quantities of raw materials employed,

(C) amounts of energy and other utilities consumed, and

(D) representative capital cost, including depreciation.

(4) Valuation of factors of production

The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise.

(d) Special rule for certain multinational corporations

Whenever, in the course of an investigation under this subtitle, the administering authority determines that—

(1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;

(2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and

(3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation,

it shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to its satisfaction. For the purposes of this subsection, in determining foreign market value of such

or similar merchandise produced in a country outside of the country of exportation, the administering authority shall determine its price at the time of exportation from the country of exportation and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the country of exportation.

(e) Constructed value

(1) Determination

For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—

(A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

(2) Transactions disregarded; best evidence

For the purposes of this subsection, a transaction directly or indirectly between persons specified in any one of the subparagraphs in paragraph (4) of this subsection may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the subparagraphs in paragraph (4) of this section.

(3) Special rule

If, regarding any transaction between persons specified in any one of the subparagraphs of paragraph (4) involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering authority may determine the value of the major input on the best evidence available regarding

such costs of production, if such costs are greater than the amount that would be determined for such input under paragraph (2).

(4) Related parties

The persons referred to in paragraphs (2) and (3) of this subsection are:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(f) Exportation from an intermediate country

If—

(1) a reseller purchases the merchandise from the manufacturer or producer of the merchandise,

(2) the manufacturer or producer of the merchandise does not know (at the time of the sale to such reseller) the country to which such reseller intends to export the merchandise,

(3) the merchandise is exported by, or on behalf of, such reseller to a country other than the United States,

(4) the merchandise enters the commerce of such country but is not substantially transformed in such country, and

(5) the merchandise is subsequently exported to the United States,

such country shall be treated, for purposes of this section, as the country from which the merchandise was exported.

28 U.S.C. § 1254 (1993)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1295(a)(5) (1993)

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

. . .

(5) of an appeal from a final decision of the United States Court of International Trade;

. . .

APPENDIX F

Uruguay Round Agreements Act, Pub. L. 103-465, § 224 (1994)

SEC. 224. NORMAL VALUE.

Section 773 (19 U.S.C. 1677b) is amended to read as follows:

"SEC. 773. NORMAL VALUE.

"(a) DETERMINATION.—In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

. . .

"(6) ADJUSTMENTS.—The price described in paragraph (1)(B) shall be—

"(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

"(B) reduced by—

"(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

"(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges,

and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

"(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

"(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

"(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

"(ii) the fact that merchandise described in subparagraph (B) or (C) of section 771(16) is used in determining normal value, or

"(iii) other differences in the circumstances of sale."